

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-2695-01

PLDarcy

date:

to: Henry Singleton, Territory Manager, Financial Services
Attn: Revenue Agent Bruce Danz, Group 1101

from: Area Counsel, LMSB (Financial Services)

subject:

Form 872 - Tax Year [REDACTED]

Consent to Extend the Statute of Limitations on Assessment
Statute of Limitations Expires: [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-10, 6501.08-17
1502.77-01 and 332.01-00

This memorandum responds to your request for additional assistance dated November 8, 2001 concerning the [REDACTED] taxable year of [REDACTED] (hereinafter sometimes referred to as the "Consolidated Group"). Specifically, you have requested that we provide you advice on who may execute a Form 872, Consent to Extend the Time to Assess Tax, on behalf of several former members of the Consolidated Group that no longer exist. You also requested our advice on the appropriate language to use on the Forms 872. This memorandum should not be cited as precedent.

In a memorandum dated August 23, 2001, we provided you with advice based upon the facts you presented to us. A copy of the August 23, 2001 memorandum is attached. In our August 23, 2001 memorandum, we advised you that there is currently no entity that can act as alternative agent for the Consolidated Group pursuant to Temporary Treasury Regulation § 1.1502-77T(a)(4) and that each former subsidiary of the Consolidated Group that remains in existence may execute the Form 872 for its tax liability.¹ We

¹ In our August 23, 2001 memorandum, we also advised you that Treasury Regulation § 1.1502-77(d) permits the former subsidiaries of the Consolidated Group to designate another member the Consolidated Group (subject to the Commissioner's approval) to act as the agent for the group. However, the taxpayer has opted not to make such a designation, and the

further advised you who may execute a Form 872 on behalf of [REDACTED], the former parent of the Consolidated Group. Finally, we provided you with the language to use in the Forms 872. The National Office agreed with the advice.

Based on the advice contained in our August 23, 2001, the Examination Team sought to obtain Forms 872 from each former member of the Consolidated Group. In preparing our memorandum dated August 23, 2001, the Examination Team and the taxpayer's representative advised us that all the former subsidiaries in the Consolidated Group remained in existence, and that all the former consolidated subsidiaries were incorporated under the laws of Delaware. The Examination Team has subsequently discovered that several of the former subsidiaries in the Consolidated Group no longer exist, and that several of these former subsidiaries were not Delaware Corporations. Therefore, we are providing additional advice on how to obtain Forms 872 on behalf of the several former consolidated subsidiaries that no longer exist.

The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice. Our August 23, 2001 memorandum was reviewed by National Office attorney Megan Fitzsimmons (CC:CORP:3).

ISSUES

1. Who may execute Forms 872 on behalf of former members of the Consolidated Group that no longer exist.
2. What specific language should be used on the Forms 872?

CONCLUSIONS

1. A state law successor in interest may execute a Form 872 on behalf of each former member of the Consolidated Group that no longer exists.

Examination Team has opted to obtain Forms 872 from each former member of the Consolidated Group. Accordingly, we will not address this procedure, nor will we address whether this procedure could apply to the new facts of this case.

2. Below, we have provided you the language we advise you to use in the Forms 872 from the former subsidiaries of the Consolidated Group that no longer exist.

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: [REDACTED]) should be captioned:

[REDACTED], as successor to [REDACTED]
(EIN: [REDACTED]) *

Put an asterisk after "(EIN: [REDACTED])" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

An officer of [REDACTED] should execute the Form 872.

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: [REDACTED]) should be captioned:

[REDACTED], as successor to [REDACTED]
(EIN: [REDACTED]) *

Put an asterisk after "(EIN: [REDACTED])" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

An officer of [REDACTED] should execute the Form 872.

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX)*

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX)*

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

_____, as successor _____ (EIN: XX-XXXXXXX) (formerly _____), as successor to _____ (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to _____'s several liability for the consolidated Federal income tax of _____ for the group's taxable year ended _____.

The Form 872 that you obtain from _____ on behalf of _____ (EIN: XX-XXXXXXX) should be captioned:

_____, as successor _____ (EIN: XX-XXXXXXX) (formerly _____), as successor to _____ (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to _____'s several liability for the consolidated Federal income tax of _____ for the group's taxable year ended _____.

A general partner of _____, the single owner of _____, may execute the Form 872 for _____. Alternatively, the Form 872 may be executed by a manager set forth in _____'s limited liability company agreement.

3. The following conclusions set forth in our August 23, 2001 memorandum remain unchanged:

- a. We do not believe there is currently any entity that can act as alternative agent for the Consolidated Group pursuant to Temporary Treasury Regulation § 1.1502-77T(a)(4).
- b. An officer of each former subsidiary of the Consolidated Group that remains in existence may execute the Form 872 to extend the statute of

limitations on assessment for the subsidiary's tax liability.

- c. [REDACTED] may execute a Form 872 as successor to [REDACTED].
- d. The Forms 872 that the Examination Team obtains from the former subsidiaries of the Consolidated Group that remain in existence and [REDACTED] should contain the language we proposed in our August 23, 2001 memorandum.

FACTS

All the facts set forth in our August 23, 2001 memorandum remain unchanged except as set forth herein. The Examination Team and the taxpayer's representative have now advised that several former subsidiaries in the Consolidated Group no longer exist, and that several of these former subsidiaries were not Delaware Corporations.

i. [REDACTED]

On the [REDACTED] consolidated return, [REDACTED] had many subsidiaries. The following subsidiaries were members of the [REDACTED] consolidated group but no longer exist today:

<u>Name</u>	<u>State of Incorporation</u>
[REDACTED]	California
[REDACTED]	New Mexico
[REDACTED]	Texas
[REDACTED]	Kansas
[REDACTED]	California
[REDACTED]	Delaware.

[REDACTED], a Delaware corporation and former subsidiary in the Consolidated Group, owed [REDACTED] percent of the outstanding stock of [REDACTED]. [REDACTED] owed [REDACTED] percent of the outstanding stock of [REDACTED], and [REDACTED]. On [REDACTED], the stock of [REDACTED] was transferred to a newly formed Delaware corporation called [REDACTED].

On [REDACTED], [REDACTED], and [REDACTED], entered into an Agreement and Plan of Merger ("Merger Agreement"). Pursuant to the Merger Agreement, [REDACTED], [REDACTED], and [REDACTED] merged with and into [REDACTED] and ceased to exist as a separate entities. [REDACTED] emerged as the surviving corporation.

[REDACTED] owed [REDACTED] percent of the outstanding stock of [REDACTED] and [REDACTED]. On [REDACTED], [REDACTED] and [REDACTED] merged with and into [REDACTED] pursuant to section 253 of the General Corporate Law of Delaware and ceased to exist as a separate entities. [REDACTED] emerged as the surviving corporation.

Also on [REDACTED], [REDACTED] converted from a Delaware corporation into a Delaware limited liability company under the name [REDACTED]. [REDACTED] transferred its interest in [REDACTED] to a general partnership called [REDACTED]. [REDACTED] is the sole owner of another Delaware limited liability company called [REDACTED]. [REDACTED] merged into [REDACTED] and with [REDACTED]. [REDACTED] emerged as the surviving entity.

ii. [REDACTED]

The following subsidiaries were members of the [REDACTED] consolidated group but no longer exist:

<u>Name</u>	<u>State of Incorporation</u>
[REDACTED] (EIN: [REDACTED])	Delaware.
[REDACTED] (EIN: [REDACTED])	New York.

[REDACTED] owned [REDACTED] percent of the outstanding stock of these entities.

On [REDACTED] the following transactions commenced. [REDACTED] created a new Delaware corporation known as [REDACTED] ("[REDACTED]"). [REDACTED] (EIN: [REDACTED]) and [REDACTED] (EIN: [REDACTED]) merged with and into [REDACTED] pursuant to section 251(c) of the General Corporate Law of Delaware and both

ceased to exist as a separate entities. [REDACTED] emerged as the surviving corporation and still exists.

DISCUSSION

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

When a common parent ceases to exist, Treasury Regulation § 1.1502-77(d) provides if neither the old parent nor the surviving members make a designation, the district director may deal with the old group members on an individual basis.² [REDACTED] did not designate another member to act on behalf of the Consolidated Group. Therefore, no designation within the scope of Treasury Regulation § 1.1502-77(d) has been made. The Examination Team is now free to obtain consents from the individual members of the Consolidated Group.

- A. A state law successor in interest may execute a Form 872 on behalf of each former member of the Consolidated Group that no longer exists

Each subsidiary that was a member of the Consolidated Group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a). That is, each member of a consolidated group is liable in its own right for the group's entire tax liability. The authority to execute a Form 872 on behalf of these entities is determined by state law. See, i.e., Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985); Lesser v. Commissioner, 47 T.C. 564, 591 (1967). [REDACTED] is a Delaware corporation, whose powers are governed by Delaware law. Section 259 of the General Corporation Law of Delaware grants the surviving corporation in a merger to act on behalf of the merged corporation. Therefore, [REDACTED] has the

² While the district director no longer exists, the regulations have not been modified to account for the reorganization of the I.R.S. Accordingly, in instances where the district director appears in the regulations, refer to the I.R.M. for the authorized individual to act as the District Director.

authority to execute a Form 872 on behalf of [REDACTED]
(EIN: [REDACTED]) and [REDACTED] (EIN: [REDACTED])
[REDACTED]).

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED]
[REDACTED] (EIN: [REDACTED]) should be captioned:

[REDACTED], as successor to [REDACTED]
[REDACTED] (EIN: [REDACTED]) *

Put an asterisk after "(EIN: [REDACTED])" and put another
asterisk at the bottom of the first page of the Form 872,
and type:

This is with respect to [REDACTED]'s several
liability for the consolidated Federal income tax of [REDACTED]
[REDACTED] for the group's
taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of
[REDACTED] (EIN: [REDACTED]) should be
captioned:

[REDACTED], as successor to [REDACTED]
[REDACTED] (EIN: [REDACTED]) *

Put an asterisk after "(EIN: [REDACTED])" and put another
asterisk at the bottom of the first page of the Form 872,
and type:

This is with respect to [REDACTED]'s
several liability for the consolidated Federal income tax of
[REDACTED] for the
group's taxable year ended [REDACTED].

As a result of the mergers discussed in the Facts section,
supra, [REDACTED] became the successor in interest
under Delaware law to [REDACTED], [REDACTED],
[REDACTED], and [REDACTED].

On [REDACTED], [REDACTED] converted from a
Delaware corporation into a Delaware limited liability company
under the name [REDACTED]. Under Delaware law, a
corporation that converts to an [REDACTED] is for all purposes the same
entity that existed before the conversion. 6 Del. C. § 18-
214(f). Thus, [REDACTED] retained the authority that
[REDACTED] had to execute Forms 872 on behalf of [REDACTED]

[REDACTED], [REDACTED], and [REDACTED].

[REDACTED] merged into and with [REDACTED]. [REDACTED] emerged as the surviving entity. When two Delaware limited liability companies merge, all the powers that were held by the entity that was merged out of existence are vested in the surviving entity. 6 Del. C. § 18-209.(g). Thus, under Delaware state law, [REDACTED] is the successor in interest to the successor in interest of [REDACTED], [REDACTED], and [REDACTED], and may act on their behalf.

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX)*

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of United [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX)*

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on behalf of [REDACTED] (EIN: XX-XXXXXXX) should be captioned:

[REDACTED], as successor [REDACTED] (EIN: XX-XXXXXXX) (formerly [REDACTED]), as successor to [REDACTED] (EIN: XX-XXXXXXX) *

Put an asterisk after "(EIN: XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income

tax of [REDACTED] for
the group's taxable year ended [REDACTED].

Pursuant to Section 18-402 of the Delaware Limited Liability Company Act, the management of a Delaware limited liability company is vested in the members owning more than 50 percent of the limited liability company. However, section 18-402 permits a limited liability company agreement to vest management authority in a delegated manager. As of July 12, 1999, Delaware general partnerships are governed by the Delaware Revised Uniform Partnership Act. See Section 1 of 72 Del. Laws, c. 151, effective July 12, 1999, superseding the former chapter 15, the Delaware Uniform Partnership Law. Under the Delaware Revised Uniform Partnership Act, any partner of a general partnership may act on behalf of the partnership. 6 Del. C. § 15-301(1). Thus, a general partner of [REDACTED], the single owner of [REDACTED], may execute the Form 872, or the Form 872 may be executed by a manager set forth in [REDACTED]'s limited liability company agreement.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. Alternatively, you may advise the taxpayer in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective

statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Should you have any questions regarding this matter, please contact Paul Darcy of this office at (212) 436-1469.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By: _____
PAUL DARCY
Attorney (LMSB)

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:2:TL-N-2695-01
PLDarcy

date: August 23, 2001

to: Territory Manager, Financial Services
Attn: Revenue Agent Bruce Danz, Group 1101

from: Area Counsel, LMSB (Financial Services)

subject:

Form 872 - Tax Year [REDACTED]

Consent to Extend the Statute of Limitations on Assessment
Statute of Limitations Expires: [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-10, 6501.08-17
1502.77-01 and 332.01-00

This memorandum responds to your request for assistance on May 25, 2001. Specifically, you have requested that we provide you advice on the proper entity to execute a Form 872, Consent to Extend the Time to Assess Tax, for the [REDACTED] taxable year of [REDACTED] (hereinafter referred to as "[REDACTED]" or the "Consolidated Group"). You also requested our advice on the appropriate language to use on the Form 872. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice. This memorandum should not be cited as precedent. We have previously discussed this issue with George Johnson (CC:CORP:B6).

ISSUES

1. Which entity may execute a Form 872 for the [REDACTED] taxable year of [REDACTED]?
2. What specific language should be used on the Form 872?

CONCLUSION

We do not believe there is currently any entity that can act as alternative agent for the Consolidated Group pursuant to Temporary Treasury Regulation § 1.1502-77T(a)(4). However, since each former subsidiary of the Consolidated Group remains in existence, each subsidiary may execute the Form 872 to extend the statute of limitations on assessment for its tax liability. Therefore, you should obtain a Form 872 from each individual subsidiary that comprised the Consolidated Group. An officer of the subsidiary should execute the Form 872. The Form 872 should be captioned:

[Name of Subsidiary] (EIN XX-XXXXXXX)*

Put an asterisk after "(EIN XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [Name of Subsidiary's] several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

[REDACTED], the former parent of the Consolidated Group, no longer exists but has a state law successor-in-interest. The Form 872 obtained on the behalf of [REDACTED] should be captioned:

[REDACTED], as successor to [REDACTED]
(EIN [REDACTED]) *

Put an asterisk after "(EIN [REDACTED])" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]'s several liability for the consolidated Federal income tax of [REDACTED] for the group's taxable year ended [REDACTED].

Alternatively, Treasury Regulation § 1.1502-77(d) permits the former subsidiaries of the Consolidated Group to designate another member the Consolidated Group (subject to the Commissioner's approval) to act as the agent for the group. If such designation is accepted, an officer of the "new" agent

should execute the Form 872 on the behalf the existing members of the Consolidated Group. We recommend that the Form 872 as follows:

Corporation (name of alternative agent) (EIN: XX-XXXXXXX),
as alternative agent for the members of [REDACTED]
[REDACTED] (EIN [REDACTED])
consolidated group*

Put an asterisk after the word "group" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to the consolidated federal income tax of [REDACTED]
[REDACTED] consolidated group for the group's taxable year ended [REDACTED].

The designated alternative agent can only act on behalf of the former members of the Consolidated Group that currently exist. Since [REDACTED] no longer exists, the Examination Team will have to obtain a Form 872 from its successor-in-interest as described above.

FACTS

[REDACTED] (EIN [REDACTED])
(hereinafter also referred to as "[REDACTED]") was a corporation incorporated under the laws of Delaware. For the taxable year [REDACTED], United Delaware acted as the common parent of [REDACTED] and filed a consolidated Federal corporate income tax return, Form 1120, on behalf of the Consolidated Group. The consolidated subsidiaries were also incorporated under the laws of Delaware.

On [REDACTED], [REDACTED] (EIN: [REDACTED]), a general partnership created in accordance with the laws of Delaware, acquired all the outstanding shares of shares of United Delaware stock. On [REDACTED], [REDACTED] changed its name to [REDACTED].³ [REDACTED] elected to be treated as a corporation for Federal tax purposes, pursuant to Treasury Regulation § 301.7701-3, by filing a Form 8832 (Entity Classification Election). On [REDACTED],

³ In this case, there are several instances of an entity changing its name. In all cases, the entity that changed its name retained the same employee identification number.

acquired an additional shares of in an I.R.C. § 351(a) transaction. For the taxable year and subsequent taxable years, filed a consolidated Federal income tax return as the common parent of an affiliated group of corporations, including and other members of the Consolidated Group.

On , changed its name to , and changed its name to . Subsequently, on , changed its name to .

was a Delaware corporation (EIN) owned percent by . On , entered into an Agreement and Plan of Merger ("Merger Agreement") with . Pursuant to the Merger Agreement, merged with and into and ceased to exist as a separate entity. emerged as the surviving corporation. All the former subsidiaries in the Consolidated Group survived and became subsidiaries of . On , converted from a Delaware corporation into a Delaware limited liability company under the name (EIN:). At this point, was the percent owner of all the former subsidiaries in the Consolidated Group. However, the shares of all the former subsidiaries in the Consolidated Group were immediately transferred to . The former subsidiaries in the Consolidated Group remain in existence.

On , filed a Statement of Dissolution of General Partnership and dissolved pursuant to the Delaware Revised Uniform Partnership Act. According to the Plan of Liquidation and Dissolution (the "Plan"), will complete winding up its affairs by . The Plan also provides that all the assets of will be distributed to , a entity and general partner of . One of s assets was transferred to in a section 367⁴ outbound transaction. However, continues to exist as a viable limited liability company under Delaware law.

⁴ Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended.

APPLICABLE LAW

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

Treasury Regulation § 1.1502-77(a) provides that the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. The common parent in its name can give waivers, and any waiver so given, will be considered as having also been given or executed by each member of the consolidated group. Thus, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. *Id.* The common parent and each subsidiary which were members of a consolidated group during any part of the year are severally liable for the tax for such years. Treas. Reg. § 1.1502-6(a). That is, each member of a consolidated group is liable in its own right for the group's entire tax liability.

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

When a common parent ceases to exist, Treasury Regulation § 1.1502-77(d) provides the following three rules for determining who has authority to act in matters relating to the tax liability of the members of the group: (1) an entity designated by the old common parent can act as agent for the members of the group; (2) if the old common parent fails to make such a designation, the

surviving members of the old group can designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the district director may deal with the old group members on an individual basis.⁵

██████████ did not designate another member to act on behalf of the Consolidated Group. Therefore, no designation within the scope of Treasury Regulation § 1.1502-77(d) has been made. The Examination Team is now free to obtain consents from the individual members of the Consolidated Group. Treasury Regulation § 1.1502-77(d) also permits the former subsidiaries of the Consolidated Group to designate another member the Consolidated Group to act as the agent. The corporation so designated must have been a member of the Consolidated Group during ██████████, and the designation must be approved by the Commissioner. The designated alternative agent can only act on behalf of the former members of the Consolidated Group that currently exist.

Additionally, Temporary Treasury Regulation § 1.1502-77T provides for alternative agents when the common parent of the group ceases to be the common parent, whether or not the group remains in existence.⁶ Temporary Treasury Regulation § 1.1502-77T(a)(4) lists the following alternative agents to act on behalf of the group:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under §1.1502-77(d), or

⁵ While the district director no longer exists, the regulations have not been modified to account for the reorganization of the I.R.S. Accordingly, in instances where the district director appears in the regulations, refer to the I.R.M. for the authorized individual to act as the District Director.

⁶ Proposed Treasury Regulation 1.1502-77(a) eliminates Temporary Treasury Regulation § 1.1502-77T for consolidated return years beginning after September 26, 2000.

- (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

DISCUSSION

Issues 1 and 2

We believe that there are two possible means of extending the statute of limitations on assessment of the Consolidated Group's tax liability. First, you may obtain consents from each individual member or the individual member's successor in interest under state law. Second, the former subsidiaries of the Consolidated Group can designate another member the Consolidated Group during [REDACTED] (subject to the Commissioner's approval) to act as agent for the existing members of the Consolidated Group.

- A. We do not believe there is currently an alternative agent to act on behalf of the Consolidated Group

Presently, the only applicable subparagraph of Temporary Treasury Regulation § 1.1502-77T is (a)(4)(ii), which lists as an alternative agent a successor to the former common parent in a transaction in which section 381(a) applies.⁷ Section 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies; or in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F), or (G) of section 368(a)(1).

The [REDACTED] (formerly [REDACTED]) - [REDACTED] merger is a section 368(a)(1)(A) ("Type A") statutory merger or consolidation. Thus, [REDACTED] became an alternative agent of the Consolidated Group. However, on [REDACTED], [REDACTED] converted from a Delaware corporation into a Delaware limited liability company under the name [REDACTED]. [REDACTED] was a single member limited liability company owned [REDACTED] percent by [REDACTED] and made no election to be taxed as a corporation. Therefore, [REDACTED] became a

⁷ The potential application of Temporary Treasury Regulation § 1.1502-77T(a)(4)(iii) is discussed in Section C, infra.

disregarded entity of [REDACTED] for Federal income tax. Treas. Reg. § 301.7701-3(b)(ii). That is, [REDACTED] (formerly [REDACTED]) effectively became a branch or division of [REDACTED]. Treas. Reg. § 301.7701-2(a). At this point, [REDACTED] (formerly [REDACTED]) lost the authority to act as the Consolidated Group's agent.

The conversion of [REDACTED] into [REDACTED], whose sole owner for federal income tax purposes was [REDACTED], does constitute a "deemed" liquidation of [REDACTED] into [REDACTED] within the meaning of section 332.⁸ This implies that [REDACTED] is "a successor to a successor," and therefore is an alternative agent under Temporary Treasury Regulation § 1.1502-77T(a)(4)(ii).

However, we recommend that you do not consider [REDACTED] an alternative agent for two reasons. First, [REDACTED] has dissolved. Under the Delaware Revised Uniform Partnership Act § 15-802(a), [REDACTED] continues to exist after its dissolution for the purpose of winding up its business affairs. It is unclear whether [REDACTED] has the authority to act as an agent for other entities during its dissolution. Second, the conversion of [REDACTED] into [REDACTED] is only a "deemed" section 332 liquidation. That is, no gain or loss shall be recognized to [REDACTED] or [REDACTED]. However, the conversion of [REDACTED] into a disregarded entity does not strictly comply with the requirements of Section 332(b). This failure makes it unclear whether [REDACTED] has obtained the authority that [REDACTED] previously had to act as an agent for the Consolidated Group. Thus, we believe it would be very risky to consider [REDACTED] an alternative agent.

- B. Each former Consolidated Group member or state law successor in interest may execute a Form 872 to extend the statute of limitations on assessment each former member's liability

Each subsidiary that was a member of the Consolidated Group during any part of the consolidated return year is severally

⁸ Based on our review of National Office guidance (i.e., PLR 200129029 [April 20, 2001] and FSA 200052003 [Sep. 01, 2000]), it appears that conversion of a subsidiary corporation into single owner LLC constitutes a liquidation of the subsidiary corporation into its parent within the meaning of section 332.

liable for the tax for such year. Treas. Reg. § 1.1502-6(a). [REDACTED] did not designate another member to act on behalf of the Consolidated Group when it merged into [REDACTED]. Therefore, the Examination Team is free to obtain consents from the individual members of the Consolidated Group. Treas. Reg. § 1.1502-77(d). Each former subsidiary of the Consolidated Group exists; therefore, an officer of each subsidiary can execute a consent the subsidiary's behalf.

[REDACTED], the former parent of the Consolidated Group, no longer exists. The authority to execute a Form 872 on behalf of United Delaware is determined by Delaware state law. See, i.e., Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985); Lesser v. Commissioner, 47 T.C. 564, 591 (1967). Section 259 of the General Corporation Law of Delaware grants the surviving corporation in a merger to act on behalf of the merged corporation. Prior to its conversion into an LLC, [REDACTED], had the authority to execute Form 872 on behalf of [REDACTED]. Under Delaware law, a corporation that converts to an LLC is for all purposes the same entity that existed before the conversion. 6 Del. C. § 18-214(f). Therefore, [REDACTED] has the authority to execute a Form 872 on behalf of [REDACTED].⁹

The Forms 872 from each former consolidated subsidiary should be executed by an officer of the subsidiary. The Form 872 should be captioned:

[Name of Subsidiary] (EIN XX-XXXXXXX)*

Put an asterisk after "(EIN XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [Name of Subsidiary's] several liability for the consolidated Federal income tax of the [REDACTED] for the group's taxable year ended [REDACTED].

The Form 872 that you obtain from [REDACTED] on the behalf of [REDACTED] should be captioned:

[REDACTED], as successor to [REDACTED]
(EIN [REDACTED]) *

⁹ However, [REDACTED] has no authority to act on behalf of the Consolidated Group.

Put an asterisk after "(EIN XX-XXXXXXX)" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to [REDACTED]
[REDACTED]'s several liability for the consolidated Federal
income tax of the [REDACTED]
[REDACTED] for the group's taxable year ended [REDACTED].

Pursuant to Section 18-402 of the Delaware Limited Liability Company Act, the management of a Delaware limited liability company is vested in the members owning more than 50 percent of the limited liability company. However, section 18-402 permits a limited liability company agreement to vest management authority in a delegated manager. Thus, an officer of [REDACTED]
[REDACTED]'s single owner may execute the Form 872, or the Form 872 may be executed by a manager set forth in [REDACTED]
[REDACTED]'s limited liability company agreement.

- C. The former subsidiaries of the Consolidated Group can designate an existing member of the Consolidated Group to act as Agent for the Consolidated Group.

Treasury Regulation § 1.1502-77(d) permits the former subsidiaries of the Consolidated Group to designate another member the Consolidated Group to act as the agent for the group pursuant to Treas. Reg. § 1.1502-77(d). Temporary Treasury Regulation § 1.1502-77T(a)(4)(iii) identify the agent designated by the group under §1.1502-77(d) as an alternative agent of the group. The corporation so designated must have been a member of the Consolidated Group during [REDACTED], and the designation must be approved by the Commissioner. If such designation is accepted by the Commissioner, an officer of the "new" agent should execute the Form 872 on the behalf the existing members of the Consolidated Group. We recommend that the taxpayer be identified on the Form 872 as follows:

Corporation (name of alternative agent) (EIN: XX-XXXXXXX),
as alternative agent for the members of [REDACTED]
[REDACTED]. (EIN [REDACTED])
consolidated group*

Put an asterisk after the word "group" and put another asterisk at the bottom of the first page of the Form 872, and type:

This is with respect to the consolidated federal income tax of the [REDACTED] consolidated group for the group's taxable year ended [REDACTED].

The designated alternative agent can only act on behalf of the former members of the Consolidated Group that currently exist. Since [REDACTED] no longer exists, the Examination Team will still have to obtain a Form 872 from [REDACTED], as successor to [REDACTED]. See Supra.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. Alternatively, you may advise the taxpayer in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Should you have any questions regarding this matter, please contact Paul Darcy of this office at (212) 264-264-5473, ext. 256.

ROLAND BARRAL
Area Counsel (Financial Services)

By: _____
PAUL DARCY
Attorney (LMSB)